81-2277

Office - Supreme Court, U.S.
FILED
JUN 9 1982
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1981

No. _____

NORTH STATE CHEMICALS, INC.,	)
Petitioner,	)
v.	)
O. W. STRICKLAND, etc., et al.,	)
Respondents.	)

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Norman B. Smith
Martha E. Johnston
Smith, Patterson, Follin,
Curtis, James & Harkavy
704 Southeastern Bldg.
Greensboro, NC 27401
Telephone: (919) 274-2992

Counsel for Petitioner

QUESTION PRESENTED

Whether the doctrine of sovereign immunity is an affirmative defense which, when asserted by the United States in a particular action and found by the Court to be applicable, bars the Court from granting relief against the government; or whether sovereign immunity, whenever found to be applicable, deprives the Court of subject matter jurisdiction over the action.

PARTIES TO THE PROCEEDING BELOW

Petitioner North State Chemicals, Inc.,[1] was appellant below. Appellees in the proceeding were O. W. Strickland, Head, Solid and Hazardous Waste Management Branch, Environmental Health Section,

---

1/ North State Chemicals, Inc., is not a parent company, subsidiary or affiliate of any other corporation.

North Carolina Department of Human Resources; Sarah T. Morrow, Secretary of North Carolina Department of Human Resources; Thomas F. Owens, Director, Guilford County Department of Environmental Health; Rebecca W. Hanmer, Regional Administrator, Region IV, U.S. Environmental Protection Agency.

TABLE OF CONTENTS

	Page
Question Presented	2
Parties to the Proceeding	2
Table of Authorities	5
Opinions Below	6
Fourth Circuit Court of Appeals Opinion	A1
District Court Memorandum and Order of Remand	A4
District Court Judgment and Order of Remand	A18
Jurisdiction	6
Statutory Provisions	7
Statement of the Case	12
Reasons for Granting the Writ:	20
The applicability of sovereign immunity in a suit against the United States provides a complete defense on the merits, but does not deprive the court of subject matter jurisdiction over the controversy.	
Conclusion	30
Appendix	A1

TABLE OF AUTHORITIES

Page

Cases:

Andrus v. Rupp, 433 F.2d 70 (9th Cir. 1970) 28

Bell v. Hood, 32 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946) 24, 26

Ex Parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed. 714 (1908) 28

Freeman v. Bee Machinery Co., 319 U.S. 448 (1943) 22

Manufacturers National Bank v. Brownstown Square Apartments, 491 F.Supp. 206 (E.D. Mich. 1978) 23

Mine Safety Appliances Co. v. Forrestal, 326 U.S. 371, 374, 66 S.Ct. 219, 90 L.Ed. 149 (1945) 28

National Treasury Employees Union v. Campbell, 589 F.2d 669, 673-76 (D.C. Cir. 1978) 24

Northern Packfic Ry. Co. v. North Dakota, 250 U.S. 135, 151-52, 35 S.Ct. 429, 59 L.Ed. 735 (1919) 28

Willingham v. Morgan, 395 U.S. 402, 89 S.Ct. 1813, 23 L.Ed. 2d 396 (1969) 21

Statutes:

	Page
40 C.F.R. §122.23	16
5 U.S.C. §§702-704	10, 14, 22, 27
28 U.S.C. §1254	6
28 U.S.C. §1331	14
28 U.S.C. §1331(a)	10, 22, 24, 27
28 U.S.C. §1346(a)(2)	27
28 U.S.C. §1346(b)	27
28 U.S.C. §1346(f)	27
28 U.S.C. §1442(a)(1)	7, 13, 21
28 U.S.C. §2409(a)	27
42 U.S.C. §6921	15
42 U.S.C. §6925(e)	7, 16, 21
42 U.S.C. §6972(a)	8, 14, 22
46 U.S.C. §781	27

Law Reviews:

"Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments," 87 Yale L.J. 164, 216-224 (Nov. 1977)	29

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, No. 81-2017 (April 1, 1982) is unpublished. The judgment and memorandum opinion of the United States District Court for the Middle District of North Carolina, No. C-81-199-G (September 18, 1981) is also unpublished. Both opinions are reproduced in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit of which petitioner seeks review herein was entered on April 1, 1982. This petition is being filed within 90 days of that date.

The jurisdiction of this Court is invoked under §1254 of Title 28, United States Code.

STATUTORY PROVISIONS

28 U.S.C. §1442(a)(1):

(a) a civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

42 U.S.C. §6925(e):

(e) Interim status. - Any person who -

(1) Owns or operates a facility

required to have a permit under this section which facility is in existence on November 19, 1980,

(2) has complied with the requirements of §6930(a) of this Title, and

(3) has made an application for a permit under this section

shall be treated as having been issued such permit until such time as final administrative disposition of such application is made, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application.

42 U.S.C. §6972(a):

(a) In general. - Except as provided in subsection (b) or (c) of this

section, any person may commence a civil action on his own behalf -

(1) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, or order which has become effective pursuant to this Chapter; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occured. Any action brought under paragraph (a)(2) of this

subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such regulation or order, or to order the Administrator to perform such act or duty as the case may be.

28 U.S.C. §1331(a):

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

5 U.S.C. §702:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute,

is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or an employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other

limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

STATEMENT OF THE CASE

This action began in the Superior Court of Guilford County, North Carolina. Plaintiff, North State Chemicals, Inc., operator of a facility for treatment, storage, and disposal of waste materials defined as hazardous, sought preliminary and permanent injunctive relief against defendants Sarah T. Morrow, Secretary of the North Carolina Department of Human Resources, and O. W. Strickland, in charge of hazardous waste management

matters for that agency, and also against defendant Thomas F. Owens, Director of the Guilford County Department of Environmental Health. Plaintiff amended its complaint to join as a defendant the Regional Administrator of Region IV of the United States Environmental Protection Agency. Thereupon, the Regional Administrator filed a removal petition, pursuant to 28 U.S.C. §1442(a)(1), transferring the case to the United States District Court for the Middle District of North Carolina. In that court defendants Morrow and Strickland (hereinafter referred to as the state defendants) moved for summary judgment, and the defendant regional administrator (hereinafter referred to as the federal defendant) moved alternatively for dismissal or summary judgment.

While the motions to dismiss and for summary judgment were awaiting hearing, plaintiff filed two motions to amend its complaint, the first to assert jurisdiction under 28 U.S.C. §1331 and 5 U.S.C. §§702-704, and the second to assert jurisdiction under 42 U.S.C. §6972(a).

For reasons stated in a memorandum and order of remand, the district court on September 18, 1981, ordered that (1) the claim against the federal defendant be dismissed, and (2) the remainder of the case be remanded to the state court. Notice of Appeal was filed on October 6, 1981. On April 1, 1982, the United States Court of Appeals for the Fourth Circuit affirmed the district court's order for the reasons stated in that court's opinion.

Plaintiff had operated its facility

for the treatment, storage, and disposal of waste materials on property rented from Southern Railroad Company in Greensboro, North Carolina, for several years prior to the effective date of the Resource Conservation and Recovery Act, 42 U.S.C. §6921, et seq. On January 23, 1981, plaintiff physically moved its facility to a non-contiguous location on Hunt Club Road, Pleasant Garden, North Carolina, on property leased from Piedmont Cedar Products, Inc. It was stipulated that the physical relocation of plaintiff's facility would not involve capital investment exceeding 50 percent of the capital cost of a comparable entirely new hazardous waste management facility; nor any wastes, processes, or design capabities different from those set forth in the permit application; nor any

changes of ownership or operational control from that set forth in the permit application; and that the wastes being handled by plaintiff will either be beneficially used, reused, legitimately recycled, or reclaimed, or would be accumulated, stored, or chemically treated prior thereto.

Two requirements are imposed by 42 U.S.C. §6925(e) and 40 C.F.R. §122.23 (a), for attaining "interim status" under the Resource Conservation and Recovery Act. These are (1) submitting E.P.A. Form 8700-12 to the administrator of the Environmental Protection Agency within 90 days after May 19, 1980; and (2) filing Part A of a permit application with the regional administrator of the Environmental Protection Agency within six months after May 19, 1980. The E.P.A. Form 8700-12 was filed late, on October

25, 1980. The Part A application was timely filed. However, the Part A application was not signed by plaintiff's former lessor, Southern Railway Company.

The parties stipulated that at the request of the regional director of the Environmental Protection Agency, sometime after November 19, 1980, plaintiff resubmitted Form 8700-12 and the Part A application, with the new Hunt Club Road address being substituted, and with the authorized signature of the landlord, Piedmont Cedar Products, Inc., appearing on the resubmitted Part A application.

The federal defendant informed the state defendants by letter of April 1, 1981, of the Environmental Protection Agency's "determination" that plaintiff "does not have Interim Status, and may not operate a hazardous waste management facility at this time."

On December 18, 1980, the Environmental Protection Agency granted the State of North Carolina primary enforcement responsibility for the hazardous waste program under the Resource Conservation and Recovery Act within this state. On March 11, 1981, the state defendants sent plaintiff a letter alleging that plaintiff was in violation of the law and applicable regulations by maintaining its relocated facility in Pleasant Garden. A penalty of $1,000.00 was assessed, with per diem penalties of $500.00 to accrue beginning March 20, 1981.

Plaintiff brought this action, seeking to establish that it had lawful interim status for the treatment, storage, and disposal of waste materials under the Resource Conservation and Recovery Act and to enjoin defendants from assessing penalties and otherwise interfering

with plaintiff's activities.

The chemicals in question consist of about three hundred 55 gallon drums, consisting primarily of nickel electroplating wastes and halgonated solvent (solutions of resin and of latex). The contents of about one third of the barrels will not burn at all; the contents of the remaining barrels have a flash point higher than 140°F. None of the materials are "highly toxic" as defined by the applicable regulations.

REASONS FOR GRANTING THE WRIT

The applicability of sovereign immunity in a suit against the United States provides a complete defense on the merits, but does not deprive the court of subject matter jurisdiction over the controversy.

This case provides an excellent example of the confusion that often arises when the term "jurisdiction" is used to refer to both the broad rules of subject matters cognizable in federal court, and to specific issues of the presence or absence of sovereign immunity when a lawsuit is brought against a federal official or agency. Petitioner first sought injunctive relief in state court against several defendants, seeking to establish that they had unlawfully denied North State Chemicals, Inc., interim status under the

Resource Conservation and Recovery Act, 42 U.S.C. §6925(e). The federal defendant then immediately removed the controversy to federal court pursuant to 28 U.S.C. §1442(a)(1), which was her right even if there was no more than a colorable claim that she acted within the scope of her official duties. Willingham v. Morgan, 395 U.S. 402, 89 S.Ct. 1813, 23 L.Ed. 2d 396 (1969).

After removal of the case was effected, the district court granted the federal defendant's motion for dismissal on the ground that the doctrine of sovereign immunity barred the action against the EPA Regional Administrator in state court, that court therefore lacked jurisdiction over the action, and the federal court therefore lacked derivative jurisdiction. For that reason, the court refused to consider petitioner's

motions to amend its complaint in federal court in order to assert claims under 28 U.S.C. §1331(a) and 5 U.S.C. §702-704, and 42 U.S.C. §6972(a). Both of these provisions contain waivers of sovereign immunity.

It is well established that a litigant may amend the pleadings in a removed case, asserting a cause of action over which the state court would not have had jurisdiction, but which is within the jurisdiction of the federal court. Freeman v. Bee Machinery Co., 319 U.S. 448 (1943). Of course, the state court must itself have had jurisdiction over the original action, as it must in order for any case to be properly removed.

It is petitioner's position that the state court had subject matter jurisdiction over the action, and that the assertion of the defense of sovereign

immunity, even had it been made in state court, would not have destroyed that jurisdiction. Likewise, the federal court had subject matter jurisdiction of the cause upon removal, and properly could have granted plaintiff's motion to amend, thus rendering moot the federal defendant's sovereign immunity defense.

The existence of subject matter jurisdiction and the applicability of the defense of sovereign immunity are two separate issues which should be addressed in separate inquiries by the court. Manufacturers National Bank v. Brownstown Square Apartments, 491 F. Supp. 206 (E.D. Mich. 1980). The logical sequence of the inquiry is for the court first to determine whether there is subject matter jurisdiction, and if so, then to decide whether the defense of subject matter jurisdiction applies. The

determination on subject matter jurisdiction is a threshold one that the suit states a cause of action which is on its face cognizable in federal court. If it does, then the court should proceed to consider whether the defense of sovereign immunity applies; and if so, should grant the government's motion to dismiss because the court would be unable to grant relief. See National Treasury Employees Union v. Campbell, 589 F.2d 669, 673-76 (D.C. Cir. 1978).

The reasoning is analogous to that applied by this court in Bell v. Hood, 32 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946). There the plaintiffs sought to state a claim based on the federal question jurisdiction of the predecessor statute to 28 U.S.C. §1331(a), for damages as a remedy for deprivation of Fourth and Fifth Amendment rights. Because a private

right of action based on those constitutional provisions was not then recognized, the lower courts dismissed for want of jurisdiction on the ground that the suit did not arise under the Constitution or laws of the United States. This court reversed, stating,

> Jurisdiction, therefore is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy.

327 U.S. at 680.

The procedure in suits against the federal government, its agencies or of-

ficers should be similar to that outlined in Bell v. Hood for determining the disposition of federal question cases. The court should make a threshold determination that the claim is nonfrivolous and arguably based upon grounds that provide a right to sue the United States. Having made a positive determination on this question, the court should then inquire into whether the asserted basis of the suit is one upon which, because statutory consent has been given or for any other reason, relief may actually be granted against the United States. If it is not, then the court should dismiss the claim on its merits, for failure to state a claim upon which relief can be granted.

The federal government has waived its sovereign immunity in so many respects that this procedure for a judicial determination of its existence is particularly

appropriate. For example, the United States has consented to suit against itself in the Federal Tort Claims Act, 28 U.S.C. §1346(b); the Tucker Act, 28 U.S.C. §1346(a)(2); 28 U.S.C. §2409(a) and §1346(f) (actions to quiet title to an estate or interest in real property in which an interest is claimed by the United States); the Public Vessels Act, 46 U.S.C. §781 et seq; and the general federal question jurisdiction under 28 U.S.C. §1331(a) coupled with the waiver of immunity in the Administrative Procedure Act, 5 U.S.C. §702 (at least for actions seeking relief other than money damages). Additionally, under the common law an officer of the federal government may be sued in a non-damage action such as the instant case for actions exceeding the scope of authority of his or her office, and sovereign

immunity will not be a defense if the officer's actions are as alleged in the complaint. Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908); Andrus v. Rupp, 433 R.2d 70 (9th cir. 1970). Such actions are also within the jurisdiction of state courts. Northern Pacific Ry. Co. v. North Dakota, 250 U.S. 135, 151-52, 35 S.Ct. 429, 59 L.Ed. 735 (1919). When a federal officer is named as an individual defendant, the court's task is to determine the government's true interest in each case "by the essential nature and effect of the proceeding, as it appears from the entire record." Mine Safety Appliances Co. v. Forrestal, 326 U.S. 371, 374, 66 S.Ct. 219, 90 L.Ed. 149 (1945). Such a determination, as well as the detailed inquiry that must often be made in order to decide whether a particular cause of action comes with-

in the terms of any of the federal government's statutory consents to suit, is properly conducted as an inquiry into the merits of the action, after the court has assumed jurisdiction over the controversy. See generally Note, "Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments," 87 Yale L.J. 164, 216-224 (Nov. 1977).

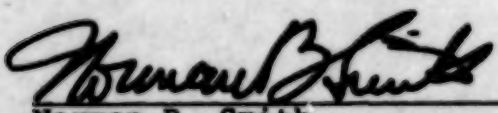
In many of the actions wherein the United States is a defendant, the sequence of analysis followed would make no practical difference in the outcome of the case; if sovereign immunity applied, the case would be dismissed on one ground or the other. In this case, however, careful analysis of the issues would probably have prevented dismissal of petitioner's case from federal court, because the district court would have assumed jurisdiction of the cause and

then ruled on petitioner's motion to amend, which under Rule 15a, Fed.R.Civ.P., should be "freely given when justice so requires." In the additional statutory bases asserted in the motion to amend, as explained above, there is included a waiver of sovereign immunity. Thus, petitioner's case should have survived dismissal both for lack of subject matter jurisdiction and for failure to state a claim for relief.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the opinion and order of the United States Court of Appeals for the Fourth Circuit, in order that an important question of federal law may be properly resolved.

Respectfully submitted,



Norman B. Smith
Smith, Patterson, Follin,
Curtis, James & Harkavy
704 Southeastern Building
Greensboro, NC 27401
Telephone: (919) 274-2992



Martha E. Johnston
Smith, Patterson, Follin,
Curtis, James & Harkavy
704 Southeastern Building
Greensboro, NC 27401
Telephone: (919) 274-2992

Counsel for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 81-2017

NORTH STATE CHEMICALS, INC.,

Appellant,

v.

O. W. STRICKLAND, Head, Solid and Hazardous Waste Management Branch, Environmental Health Section, NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES; SARAH T. MORROW, Secretary of North Carolina Department of Human Resources; THOMAS F. OWENS, Director, Guilford County Department of Environmental Health; REBECCA W. HANMER, Regional Administrator, Region IV, U.S. Environmental Protection Agency,

Appellees.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Hiram H. Ward, District Judge.

Argued: March 1, 1982 Decided: April 1, 1982

Before RUSSELL and HALL, Circuit Judges, and CACHERIS, District Judge.

PER CURIAM:

Plaintiff, North State Chemicals, Inc. (North State), initiated this suit in the Superior Court of Guilford County, North Carolina, seeking injunctive relief against O. W. Strickland and Sarah T. Morrow, officials of the North Carolina Department of Human Resources, and Thomas F. Owens, the director of the Guilford County Department of Environmental Health.

Subsequently, North State amended its complaint to request declaratory relief against Rebecca W. Hanmer, the Region IV Administrator of the United States Environmental Protection Agency. Pursuant to 28 U.S.C. §§1442(a)(1), 1446, Hanmer removed the case to federal district court.

The court below dismissed North State's claim against Hanmer and, accordingly, remanded the remainder of the case to state court pursuant ot 28 U.S.C. §1447(c). North State appeals.

After consideration of the record, the briefs, and oral argument, we affirm for the reasons expressed by the district court. North State Chemicals, Inc. v. Strickland, et al., C/A No. C-81-199-G, M.D. N.C. (September 18, 1981).

A F F I R M E D .

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GREENSBORO DIVISION

NORTH STATE CHEMICALS, INC.,	)	
Plaintiff,	)	
v.	)	C-81-199-G
O. W. STRICKLAND, et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER OF REMAND

WARD, District Judge

This matter is before the Court on plaintiff's motion to amend its Complaint (May 5, 1981), the federal defendant's motion for dismissal or, in the alternative, for summary judgment (June 24, 1981), and two state defendants' motion for summary judgment (July 22, 1981). Plaintiff, a North Carolina corporation, filed this action in Superior Court of Guilford

County, North Carolina, requesting injunctive relief against O. W. Strickland and Sarah T. Morrow, officials of the North Carolina Department of Human Resources (hereafter state defendants), and Thomas F. Owens, director of the Guilford County Department of Environmental Health (hereafter county defendant). On April 14, 1981, plaintiff amended its complaint to seek declaratory relief against Rebecca W. Hanmer, Regional Administrator of Region IV of the United States Environmental Protection Agency (hereafter EPA).[1] On May 5, 1981, Hanmer removed the case to this Court pursuant to 28 U.S.C. §1442(a)(1). For the reasons

---

1 Counsel for Hanmer informed the Court that Charles R. Jeter has replaced defendant Hanmer as EPA Regional Administrator. See Fed.R.Civ.P. 25 (d)(1).

which follow, the Court will dismiss the claim against Hanmer and remand the remaining claim against the state and county defendants to state court.

For the past several years plaintiff has operated a hazardous waste storage and disposal facility. Formerly located on Spring Garden Road in Greensboro, North Carolina, this facility has been located on Hunt Club Road in Pleasant Garden, North Carolina, since around January 23, 1981. Plaintiff attempted to operate at its new location in compliance with the temporary permit requirements of federal law[2] and state law.[3] However, around March 11, 1981, O.W. Strickland, head of the Solid and

---

2 42 U.S.C.A. §6925(e) (1977 & Supp. 1981); 40 C.F.R. §122.23 (1980).

3 N.C.Gen.Stat. §130-166.18(c)(14), .18(e) (1981); 10 N.C.A.C. 10F .0034(b)(2) (1980).

Hazardous Waste Management Branch, Environmental Health Section, Division of Health Services of the North Carolina Department of Human Resources, sent to plaintiff a letter notifying it that operation of the new facility was illegal because plaintiff had neither obtained a permanent permit nor qualified for a temporary permit. The state assessed against plaintiff a penalty of $1,000 plus an additional $500 for each day the plaintiff operated the facility after March 20, 1981. At Strickland's request, Howard Zeller, Acting Director of the Enforcement Division, Region IV, EPA, sent to Strickland a letter confirming that plaintiff had not qualified for "interim status" (a temporary permit to operate) under 42 U.S.C. §6925(e) and 40 C.F.R. §122.23.

Plaintiff contends that it is en-

titled to a temporary permit and seeks an injunction against the state and local defendants directing them not to take plaintiff's property, assess any penalties, or otherwise interfere with the operation of the plaintiff's waste facility. Plaintiff seeks a declaratory judgment against Hanmer that it is entitled to a temporary permit and to continue operation of its Hunt Club Road facility.

Hanmer, the federal defendant, bases her motion to dismiss the complaint on the ground that this Court lacks derivative jurisdiction to entertain this action. Hanmer contends that the state court could not have entertained this lawsuit against her because the defense of sovereign immunity barred that court from having jurisdiction. In response, plaintiff maintains that whether the state

court had jurisdiction over the claim against Hanmer is not controlling on the question of this Court's jurisdiction because the defense of sovereign immunity is not jurisdictional and was not asserted by Hanmer prior to the petition to remove. Plaintiff also contends that sovereign immunity is inapplicable here because the claim is against defendant Hanmer as an individual and not against the EPA or the United States.

Removal of an action from state court to federal court is improper if the action was not within the state court's jurisdiction, even if the action could have been brought originally in federal court. Lambert Run Coal Co. v. Baltimore and Ohio Railroad Co., 258 U.S. 377, 42 S.Ct. 349, 66 L.E. 671 (1922); 14 C.Wright, A.Miller, and E.Cooper, Federal Practice and Procedure §3721 (1976). An action may be

brought against a federal official in a state or federal court only if there is a statutory waiver of immunity or if the action is, in reality, against the official in his individual capacity or for acts done beyond his authority. Cash v. Califano, 469 F.Supp. 129, 131-32 (W.D.Va. 1979), aff'd, 621 F2d 626 (4th Cir. 1980); 14 C.Wright, A.Miller, and E.Cooper, Federal Practice and Procedure §3655 (1976). Unless waived or inapplicable, sovereign immunity deprives a court of jurisdiction to entertain a case against a federal official. United States v. Sherwood, 312 U.S. 586, 61 S.Ct. 767, 85 L.Ed. 1058 (1941). Therefore, if sovereign immunity barred jurisdiction over the claim against the federal defendant in state court, it likewise bars jurisdiction here.

The Court concludes that the doc-

trine of sovereign immunity is inapplicable as a bar to this action against the federal defendant. Although plaintiff sued Hanmer, an individual and an official of the EPA, it is obvious that the action is actually brought against the EPA as an agency of the United States. Plaintiff seeks a declaratory judgment that it is entitled to a temporary permit to operate its facility. This relief would affect the agency's ability to act and would not affect Hanmer as an individual, but only as an EPA official. In the Complaint, plaintiff named Hanmer as defendant and not Zeller, the person who wrote the letter to Strickland about which plaintiff complains. As here, where a lawsuit is against a named person but is, in fact, against the government, sovereign immunity applies. Hawaii v. Gordon, 373 U.S. 57, 83 S.Ct.

1052, 10 L.Ed.2d 191 (1963) (per curiam); International Federation of Professional and Technical Engineers, Local No. 1 v. Williams, 389 F.Supp. 287, 291 (E.D. Va. 1974), aff'd, 510 F.2d 966 (4th Cir. 1975). Even if Zeller erred in his determination that plaintiff was not entitled to a temporary permit, sovereign immunity still bars suit against the EPA. Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 695, 69 S.Ct. 1457, ____, 93 L.Ed. 1628, 1638-39 (1949). The plaintiff has not cited nor has the Court discovered a statutory waiver of sovereign immunity which would have allowed the state court to have entertained the claim against Hanmer.

Neither Manufacturers National Bank v. Brownstown Square Apartments, 491 F.Supp. 206 (E.D. Mich. 1980) nor National Treasury Employees Union v.

Campbell, 589 F.2d 669 (D.C. Cir. 1978), relied upon by the plaintiff support the proposition that this Court may entertain the claim against the EPA when the state court was incompetent to entertain it. In the former case, the Secretary of Housing and Urban Development was a third party defendant in a suit to recover money drawn against a letter of credit. The defendant removed the case to federal court which was competent to hear it. Plaintiff pointed out that the Brownstown court stated that "[i]nquiries into whether Congress has waived sovereign immunity and whether it has bestowed subject matter jurisdiction upon a lower federal court are fundamentally different inquiries. . . ." Plaintiff's Response in Opposition to Defendants' Motions p. 4 (August 13, 1981). However, that court also stated in that same sentence that

"both relate to jurisdictional defects in that they affect the competency of the court to adjudge the given dispute." Manufacturers National Bank v. Brownstown Square Apartments, 491 F.Supp. 206, 210. (Emphasis added). It is true that these matters require different inquiries. As courts of limited jurisdiction, federal courts must be bestowed with subject matter jurisdiction. A general grant of subject matter jurisdiction, such as that found in 28 U.S.C. §1346(a)(2), is not a waiver of sovereign immunity. This difference was also noted in National Treasury Employees Union v. Campbell, 589 F. 2d 669, 673 & n. 7. There, the action was originally filed in federal court and the court held that immunity had been waived by statute.

Plaintiff has moved to amend its complaint in order to allege jurisdic-

tion under 28 U.S.C. §1331, 5 U.S.C. §702-704, and 42 U.S.C. §6972(a). None of these statutes are a grant of jurisdiction or waiver of sovereign immunity enabling the state court to entertain the action against the EPA. Consequently, the motion should be denied since granting it would not cure the derivative jurisdictional defect.[4] Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); Lann v. Hill, 436 F.Supp. 463, 467-69 (W.D. Okla. 1977).

4/ Freeman v. Bee Machine Co., 319 U.S. 448, 63 S.Ct. 1146, 87 L.Ed. 1509 (1943) does not stand as authority for the proposition that plaintiff's proposed amendment would cure the jurisdictional defect. There, the Supreme Court held that once a case was removed from a state court having jurisdiction over the case, the federal court could allow an amendment alleging a cause of action which could not have been brought in the state court.

The defense of sovereign immunity in the state court prevents this Court from having removal jurisdiction pursuant to 28 U.S.C. §1442(a)(1). Manufacturers National Bank v. Brownstown Square Apartments, 491 F.Supp. 206, 210. However, the state court appears to have jurisdiction over the claim against the state and county defendants. Therefore, it is appropriate to remand this case to state court pursuant to 28 U.S.C. §1447 (c). See Whealton v. United States, 271 F.Supp. 770 (E.D. Va. 1967). Remand renders unnecessary consideration of defendants' other motions.

IT IS THEREFORE, ORDERED, that the claim against Rebecca W. Hanmer, Regional Administrator, Region IV, be, and the same hereby is DISMISSED. A judgment dismissing this claim will be entered accordingly.

IT IS FURTHER ORDERED that the remainder of this case be, and hereby is, REMANDED to state court for further proceedings on plaintiff's action for injunctive relief against defendants Strickland, Morrow, and Owens.

S/ Hiram H. Ward
United States District Judge

September 18, 1981.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

NORTH STATE CHEMICALS, INC.,	)	
Plaintiff,	)	
v.	)	C-81-199-G
O. W. STRICKLAND, et al.,	)	
Defendants.	)	

JUDGMENT AND ORDER OF REMAND

This matter came before the Court on plaintiff's motion to amend its complaint (May 5, 1981), the federal defendant's motion for dismissal or, in the alternative, for summary judgment (June 24, 1981), and two state defendant's motion for summary judgment (July 22, 1981). In a Memorandum and Order of Remand, filed contemporaneously herewith, the Court concluded that it lacked derivative jurisdiction to hear the plaintiff's claims, that the claim against the federal defen-

dant, Rebecca W. Hanmer, should be dismissed and the remaining claims against state and local defendants should be remanded to state court.

IT IS, THEREFORE, ORDERED that the claim against Rebecca W. Hanmer, Regional Administrator, Region IV, be, and the same hereby is, DISMISSED.

IT IS FURTHER ORDERED that the remainder of this case be, and the same hereby is, REMANDED to state court for further proceedings on plaintiff's action for injunctive relief against defendants Strickland, Morrow, and Owens.

S/ Hiram H. Ward
United States District Judge

September 18, 1981.

Supreme Court, U.S.
FILED
JUL 30 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2277

In the Supreme Court of the United States

OCTOBER TERM, 1982

NORTH STATE CHEMICALS, INC., PETITIONER

v.

O.W. STRICKLAND, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

EDWARD J. SHAWAKER
CLAIRE L. MCGUIRE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT M. PERRY
General Counsel

BRUCE DIAMOND
Acting Associate General Counsel

MICHAEL MURCHISON
Attorney

United States Environmental Protection Agency
Washington, D.C. 20460

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2277

NORTH STATE CHEMICALS, INC., PETITIONER

v.

O.W. STRICKLAND, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

---

1. Petitioner filed this action in the Superior Court of Guilford County, North Carolina, against various state and county officials seeking to enjoin them from interfering with petitioner's hazardous wastes facility. Petitioner amended its complaint to join the Regional Administrator of Region IV of the United States Environmental Protection Agency as a defendant. Pet. App. A2.

The Regional Administrator removed the case to the United States District Court for the Middle District of North Carolina. 28 U.S.C. 1442(a)(1). The district court dismissed petitioner's claim against the Regional Administrator for lack of jurisdiction and remanded the remainder of the case to the state court. Pet. App. A16-A17. Since sovereign immunity barred state court jurisdiction of the action against the Regional Administrator, the district

court concluded that it had acquired no jurisdiction upon removal. The court of appeals summarily affirmed. 679 F. 2d 885; Pet. App. A3.

2. A federal court's jurisdiction on removal is derivative. As petitioner recognizes (Pet. 26), if a state court lacks subject matter jurisdiction of a case, a federal court acquires none on removal, even though the federal court would have had jurisdiction had the claim originally been brought before it. *Arizona* v. *Manypenny*, 451 U.S. 232, 242 n.17 (1981); *Minnesota* v. *United States*, 305 U.S. 382, 389 (1939); *Lambert Run Coal Co.* v. *Baltimore & O.R.R.*, 258 U.S. 377, 382 (1922).

Petitioner's only contention in this Court is that sovereign immunity is not a jurisdictional bar.[1] That claim was laid to rest in this context long ago. See, *e.g.*, *Minnesota* v. *United States*, *supra*, 305 U.S. at 388-389; *Lambert Run Coal Co.* v. *Baltimore & O.R.R.*, *supra*, 258 U.S. at 381-383. See also *United States* v. *Sherwood*, 312 U.S. 584, 587-588 (1941). Petitioner cites no contrary authority.[2] Since the decision of the court of appeals is correct and conflicts with no decision of any other court, review by this Court is plainly unwarranted.

---

[1]Petitioner does not challenge the district court's conclusion that sovereign immunity was a valid defense to the action in state court.

[2]Petitioner's reliance (Pet. 23-24) on *Manufacturers National Bank* v. *Brownstown Square Apartments*, 491 F. Supp. 206 (E.D. Mich. 1980); and *National Treasury Employees Union* v. *Campbell*, 589 F. 2d 669 (D.C. Cir. 1978), is misplaced. In both cases the court acknowledges that sovereign immunity is a jurisdictional bar.

In addition, the holding of the court of appeals in this case is of little practical consequence. On October 7, 1981, petitioner filed a new action against the Regional Administrator in the United States District Court for the Middle District of North Carolina (Civil No. C-81-625-G).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

EDWARD J. SHAWAKER
CLAIRE L. MCGUIRE
Attorneys

ROBERT M. PERRY
General Counsel

BRUCE DIAMOND
Acting Associate General Counsel

MICHAEL MURCHISON
Attorney

United States Environmental Protection Agency

JULY 1982

DOJ-1982-07